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IN THE

Supreme Court of the United States

October Term, 1967

No. 805

ARTHUR LEE RANEY, *et al.*,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE GOULD SCHOOL DISTRICT, a Public Body Corporate, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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INDEX

PAGE

Citations to Opinions Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provision Involved 2

Statement 2

New Construction to Perpetuate Segregation 4

Unequal Facilities and Programs 6

Teacher Segregation 8

Intimidation 9

Denial of Relief by the Courts Below 10

Summary of Argument 12

ARGUMENT

The Court Below Erred in Dismissing the Complaint Without Further Inquiry Into the Feasibility of Grade Consolidation or Other Relief Which Would Disestablish Segregation 13

A. By Dismissing the Complaint, the Courts Below Abdicated Their Responsibility Under *Brown* v. *Board of Education* to Supervise Disestablishment of the Segregated System 13

B. Use of One School for Elementary Grades and the Other for Secondary Grades Is a Reasonable Alternative to a "Choice" Plan Which Will Disestablish the Dual System 23

PAGE

C. Freedom of Choice Is Incapable of Disestablishing Segregation in the Gould School District 27

CONCLUSION 38

TABLE OF CASES

Board of Public Instruction of Duval Co., Fla. v. Braxton, 326 F.2d 616 (5th Cir., 1964) 16n

Bradley v. School Board of the City of Richmond, 382 U.S. 103 (1965) 17, 30n, 35

Brooks v. School Board of Arlington County, 324 F.2d 305 (4th Cir., 1963) 14

Brown v. Board of Education, 347 U.S. 483 (1954); 349 U.S. 294 (1955) 2, 3, 13, 14, 15, 20, 22, 28, 30

Buckner v. Board of Education, 332 F.2d 452 (4th Cir., 1964) 15

Calhoun v. Latimer, 377 U.S. 263 (1964) 14, 17n, 31n

Carr v. Montgomery County (Ala.) Board of Education, 253 F. Supp. 306 (M.D. Ala. 1966) 16n

Cooper v. Aaron, 358 U.S. 1 (1958) 31

Cypress v. Non-Sectarian Hospital Assn., 375 F.2d 648 (4th Cir., 1967) 19

Dowell v. School Board of Oklahoma City, 244 F. Supp. 971 (W.D. Okla., 1965), aff'd 375 F.2d 158 (10th Cir., 1967) cert. den. 387 U.S. 931 (1967) 16n, 24

Freeman v. Gould Special School District (No. 19,016 8th Cir.) 4n

PAGE

Goss v. Board of Education, 373 U.S. 683 (1963) 31n
Griffin v. School Board of Prince Edward County, Va., 377 U.S. 218 (1964) 16n, 18, 31n

Kelley v. Altheimer, 378 F.2d 483 (8th Cir., 1967) 11, 12n, 26, 34

Kier v. County School Board of Augusta Co., Va., 249 F. Supp. 239 (W.D. Va. 1966) 35

Louisiana v. United States, 380 U.S. 145 (1965) 16n

McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) 34
Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) 34
Moses v. Washington Parish School Board, —— F. Supp. —— (E.D. La., Oct. 19, 1967) 27

N.L.R.B. v. Newport News Shipbuilding & Drydock Co, 308 U.S. 241 (1939) 16n

Rogers v. Paul, 382 U.S. 198 (1965) 31n

Schine Chain Theatres v. United States, 334 U.S. 110 (1948) 16n
Singleton v. Jackson Municipal Separate School District, 355 F.2d 865 (5th Cir., 1966) 29n
Smith v. Hampton Training School, 360 F.2d 577 (4th Cir., 1966) 15
Smith v. Morrilton, 365 F.2d 770 (8th Cir., 1966) 14, 17n
Sweatt v. Painter, 339 U.S. 629 (1950) 34

United States v. Jefferson County Board of Education, 372 F.2d 847, affirmed en banc, 380 F.2d 385 (5th Cir., 1967) cert. denied sub nom. Caddo Parish School Board v. United States, —— U.S. ——, 19 L.ed 2d 103 (1967) 15n, 22, 29n, 30n, 33, 36n

PAGE

United States v. National Lead Co., 332 U.S. 319 (1947) 16n
United States v. Standard Oil Co., 221 U.S. 1 (1910) 16n

Wheeler v. Durham City Board of Education, 346 F.2d 768 (4th Cir., 1965) 16n

Yarbrough v. Hulbert-West Memphis, 380 F.2d 962 (8th Cir., 1967) 15

TABLE OF STATUTES AND REGULATIONS

28 U.S.C. §1254(1) 1

45 C.F.R. §80.4(c)(1) (1967) 21

45 C.F.R. §181.11 (1967) 24

45 C.F.R. §181.54 (1967) 32n

OTHER AUTHORITIES

Conant, The American High School Today (1959) 26

Racial Isolation in the Public Schools, A report of the U.S. Commission on Civil Rights, 1967 ..... 19, 28n

Southern School Desegregation, 1966-67, a Report of the U.S. Commission on Civil Rights, July 1967 ..... 19, 28n, 30n, 36n, 37n

Survey of School Desegregation in the Southern and Border States, 1965-1966 ..... 30n

The Courts, H.E.W., and Southern School Desegregation, 77 Yale L.J. 329 (1967) 19, 20, 21

Title VI, The Guidelines and School Desegregation in the South, 53 Va. L. Rev. 42 (1967) 3, 21n, 32n

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BRIEF FOR PETITIONERS

Citations to Opinions Below

The unreported April 26, 1966 opinion of the district court is reprinted in the appendix, at pp. 12-24. The August 9, 1967 opinion of the court of appeals is reported at 381 F.2d 252 and is reprinted in the appendix at pp. 143-52.

Jurisdiction

The judgment of the court of appeals was entered August 9, 1967 and petition for rehearing was denied September 18, 1967, appendix, pp. 153, 154. The petition for writ of certiorari was filed November 9, 1967 and the writ was granted January 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the court of appeals erred in denying all relief, dismissing the complaint, and declining to order the district court to supervise the desegregation process on the ground that the school board was acting in good faith and the Department of Health, Education and Welfare had initially approved the board's plan as facially sufficient to comply with Title VI of the Civil Rights Act of 1964.

2. Whether—13 years after *Brown* v. *Board of Education*,—a "choice" plan which maintains an all-Negro school is constitutional in a system with only two nearby school plants, one traditionally Negro and the other traditionally white, although assigning elementary grades to one school and secondary grades to the other is a feasible alternative assignment method which would immediately desegregate the system.

Constitutional Provision Involved

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States.

Statement

Fifteen Negro students and their parents filed a class action September 7, 1965, to enjoin the Gould School Board from (1) requiring them and all others similarly situated "to attend the all-Negro Field School" (2) "providing public school facilities for Negro pupils . . . inferior to those provided for whites" (3) "expending any funds for . . . white Gould Public Schools until and unless the Field School is made substantially equal" and (4) "otherwise

operating a racially segregated system" (A. 3-8). During trial, November 24, 1965, plaintiffs first learned of a proposed school construction program and, with leave of court, amended the complaint to pray that replacement high school classrooms be constructed on the premises of the white Gould High School, rather than at the Negro Field School (A. 12, 19, 138).

Gould is a small district of about 3,000 population, and total school enrollment of 879 in the 1965-66 school year (A. 79-80). Until the 1965-66 school year the district had not taken any steps to comply with *Brown* v. *Board of Education*, and operated completely separate schools for Negro and for white pupils with racially separate facilities (A. 31). All Negro students were instructed in a complex of buildings known as the Field Schools and all white students were taught in a complex of buildings known as the Gould Schools (A. 31). The two complexes are located about 10 blocks from each other; each contains an elementary school and a secondary school (A. 31, 73).

The school district did not consider undertaking any desegregation program until the United States Department of Health, Education, and Welfare issued Guidelines implementing Title VI of the Civil Rights Act of 1964 (A. 121-23). The district adopted a "freedom of choice" plan of desegregation for all 12 grades, but later obtained approval from H.E.W. to withdraw three grades from the plan's operation for 1965-66 because of "overcrowding" in those grades caused by Negro requests to go to the white school. There were no white requests to go to the Negro school. As a result some 28 Negro pupils, in the 5th, 10th and 11th grades were turned away from the white school (A. 14, 53-60, 62-63). During the 1965-66 school year, the enrollment figures for the school district were as follows (A. 79-80):

	Grades	*Negro*	*White*
Field Complex	1-12	477	0
Gould Complex	1-12	70	299

During the 1966-67 school year, the second year of "freedom of choice", the enrollment figures were as follows:[1]

	Grades	*Negro*	*White*
Field Complex	1-12	477	0
Gould Complex	1-12	71	304

New Construction to Perpetuate Segregation

At the time this action was filed the white Gould High School, constructed in 1964, was the most modern facility in the district (A. 89). Adjacent white Gould Elementary School was constructed in 1947, originally as a high school, and was subsequently converted to an elementary school (A. 81-82). The Negro Field Elementary School is also modern, constructed in 1954; gymnasium and auditorium were added in 1960 (A. 89-91). Negro high school classrooms, however, were located until the 1967-68 school year

[1] The record in this case, like the records in all school desegregation cases, is necessarily incomplete by the time it reaches this Court. In this case the 1965-66 school year was the last year for which the record supplies desegregation statistics. Information regarding student and faculty desegregation during the 1966-67 and 1967-68 school years was obtained from official documents, available for public inspection, maintained by the United States Department of Health, Education and Welfare. This information is based upon data supplied to the United States by respondent school district. Certified copies of these documents and an accompanying affidavit were deposited with this Court and served upon opposing counsel with the petition for writ of certiorari.

The school board has also been sued by 6 Negro teachers claiming discriminatory termination of employment. The record in that case, *Freeman v. Gould Special School District*, No. 19,016, 8th Cir. (R. 165-67) shows that for the school year 1967-68 approximately 80 to 85 Negroes attend the Gould complex and no whites attend the Field complex.

in a building, constructed in 1924, concededly obsolete and in every respect inferior to the white high school (A. 10, 16, 130). Promises by the Board to improve the Negro high school date back to 1954, a decade before any consideration was given to desegregation, and apparently resulted from a suit to require equal facilities for Negroes (A. 131-132, 129). Actual construction of a new high school building on the site of the Field School, however, did not begin until January, 1967. The new building opened in Fall, 1967, subsequent to the decision of the court of appeals (A. 65, 66).

Plaintiffs sought to shift the construction site of the new high school to the site of the white school by a timely amendment during a November 24, 1965 hearing, immediately after learning of the proposed construction (A. 137-138). The district court allowed the amendment (A. 12, 19) but refused to grant relief in an opinion in April 26, 1966. Because of illness the court reporter did not complete the transcript until one year later—April 1, 1967—thereby delaying determination of the appeal (A. 140, 152). Because the construction of the replacement facility at the Negro school had progressed by the time briefs were filed in the court of appeals, petitioners asked that court to require a utilization of the Gould School site as the single secondary school, and the Field School site as the single elementary school for the district (A. 144).[2] It was urged that such a utilization was practical, economical, educationally superior and would disestablish segregation; on the other hand to permit the racial construction to stand unmodified would make disestablishment by "choice" plan impossible.

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[2] Petitioners presented to the court of appeals an affidavit of their attorney stating that as of April, 1967 the outer shell of the new building was completed but that a number of walls, plumbing facilities and fixtures and interior walls, the roof and flooring had not been completed (A. 141, 145).

At trial, the superintendent admitted that the old Field High School was clearly a "Negro" school, and probably would continue to be an all-Negro school if replaced with a new facility at the Field site (A. 67). He also conceded that it was inefficient for a small school district to construct a new secondary school when it already had one. There would be duplication of libraries, auditoriums, agriculture buildings, science laboratories, cafeterias, and other facilities (A. 74-76). He was asked (A. 76):

> Q. "This means that you have to spend a lot more money for equipment and for materials for the Negro school in order to just have an equal department with the white school?"

He answered:

> "I suppose so. It would take more money to build a new building and equip it."

Unequal Facilities and Programs

The record shows that for many years prior to constructing the new Negro high school in 1967 the board tolerated substantial inequalities between the segregated schools. The old all-Negro high school, a wooden frame structure, was admitted by the president of the board to have been "grossly inferior" to the white high school (A. 10, 16, 130). He said that the reason no money was spent on the building was that every dollar available had been exhausted on other uses (A. 130). Nevertheless, a new all-white high school was constructed at the Gould site (rather than at the Negro Field site) in 1964 following a fire which destroyed the old high school building there (A. 83).

The Negro Field High School is completely unaccredited; the Arkansas State Department of Education rates the Field Elementary School class "C" (A. 31) and the white Gould Schools "A" (A. 10). The Negro school bathrooms were in a building separated by a walk exposed to weather (A. 51-52); the white schools had rest rooms in each building (A. 50, 52). There is an agriculture building at the predominantly white high school, and a hot lunch program for elementary and secondary students but none at the Negro site (A. 40-41). The library at the white high school contains approximately 1,000 books, and a librarian (A. 42-43). The Negro school has only three sets of encyclopedias, one purchased a month before the hearing in this case (A. 113-114). These books were kept in the principal's office, rather than in a separate library, and the principal, in effect, functions as librarian, to the extent that such function is required (A. 114). The superintendent had a complete lack of knowledge of the extent of library facilities at the Negro school (A. 42).

The science facilities at the Negro high school were inferior to those of the predominantly white high school, even though the former was larger (A. 43-44). Pupils who attend Gould generally have an individual desk and chair; the standard pattern at the old Negro school was a folding table with folding chairs and three students on each side, sitting at the table (A. 47-48).

The "per pupil" expenditure is less at Field School than for the formerly all-white, now predominantly white, Gould School (A. 44). The system has charged "enrollment fees" to pupils at Field, but not at Gould (A. 44-45). It was also the practice to require Negro students to pick cotton in the fields during class time to earn money for school fund raising projects, and to pay "enrollment fees" (A. 44-46).

Unequal per pupil expenditures are also reflected in higher student-teacher ratio at the Negro school i.e., the average class size is larger (A. 59-62). There are 14 teachers at Gould, but only 16 teachers at Field although it has about 130 more students (A. 60-61). The range of Negro teacher salaries is from $3,870 to $4,500; for white teachers, the range is from $4,050 to $5,580 (A. 33-39).

There are also disparities in course offerings. Neither vocational agriculture nor journalism, offered at Gould, are offered at Field (A. 52-53). There is a similar disparity in extracurricular activities. The larger Negro school, for example, has no football program but there is a football team at the white school (A. 106-107). There is a Future Farmers of America vocational club at the white school, but none at the Negro school "because they do not have an agricultural department" (A. 106).

Teacher Segregation

The school system has no "definite plans for faculty desegregation" (A. 67, 68). In 1965, the board "did not have any plans to reassign anybody" (A. 69). By the 1966-67 school year, the only faculty desegregation which had taken place was assignment of one part time white "supervisor" to the Negro school[3] and for the 1967-68 school year the only anticipated change was addition of a part time white teacher at the Negro school. Faculty meetings had not been integrated (A. 68). At trial, the superintendent stated that ". . . we have kept that in the background, we want to get the pupil integration question settled and run-

[3] See Note 1, *supra*.

ning as smoothly as possible before we go into something else" (A. 68). When asked whether re-assignments of faculty members were eventually contemplated, the superintendent stated that the school system "will attempt to employ Negro teachers in a predominantly white school on a limited basis, and particularly in positions that do not involve direct instructions to pupils" (A. 69). The superintendent described the Negro teachers' academic qualifications as superior to the white teachers. Every Negro teacher had a bachelor's degree and two had master's degrees. Only one white teacher had a master's degree; two have no degree (A. 33, 94-95).

Intimidation

When the PTA at the Negro school began to protest to the superintendent and the board the deplorable conditions at the old Negro high school, the superintendent responded by issuing an order which forbade the Negro PTA from meeting in the Negro high school (A. 63-64). He stated:

> "The reason for that is, as I understood, the PTA had evolved into largely a protest group against the school board and the policies of the Board. The members of that organization were the same who planned to demonstrate against the Gould high school and had sent chartered bus loads of people to Little Rock to demonstrate around the Federal Building, who were getting a chartered bus of sympathizers to come to this hearing today and it does not seem right to us to furnish a meeting place for a group of people that is fighting everything we are trying to do for them" (A. 64).

When questioned whether this meant the Negro high school parents could not have a PTA, the superintendent responded: "They can have a PTA but they can meet somewhere else" (A. 64). He later admitted that he had no knowledge that any plans for marches or demonstrations had been made at a PTA meeting, and that all that he heard to this effect was hearsay (A. 108-109). The superintendent and some members of the board obtained an injunction against several civil rights groups, enjoining them from protesting conditions in the system (A. 63).

Denial of Relief by the Courts Below

The district court denied all relief and dismissed the complaint on April 26, 1966 (A. 12-25). In its opinion, the court relied on the fact that the school district had adopted a plan without court order, that the plan was approved by the Department of Health, Education, and Welfare, and that some Negro students were attending the "white" school. With respect to the board's plan to construct new high school replacement facilities on the site of the Negro school, rather than enlarging the previously all-white school, the court decided that the replacement plan at the Negro school site was not "solely motivated by a desire to perpetuate or maintain or support segregation in the school system" (A. 24-25).

The court of appeals found that the board was operating under a "choice" plan which on its face met standards approved by the circuit and H.E.W.; that there was "no substantial evidence to support a finding that the board was not proceeding to carry out the plan in good faith"; that progress was being made in equalizing teachers' salaries; and that relief requiring that the replacement construction be undertaken at the Gould site could not be

effective because by the time the appeal was considered considerable progress had been made in constructing the building on the Field site.[4]

Although the court found that "there is no showing that the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school *when the appropriate time for such course arrives*" (emphasis supplied), it declined to order conversion of one school plant to use as an elementary school and the other as a secondary school, on the ground that such relief had not been considered by the trial court. Rather than remanding the case to the district court for consideration of such relief, the court affirmed dismissal of the complaint. In addition, the court took the position that petitioners were not entitled to a comprehensive judicial decree governing the operation of the "choice" plan, as ordered by a different panel of the court in *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir. 1967):

> Unlike the Altheimer situation, no attack has been made in the pleadings on the desegregation plan adopted by the Board. Additionally, we find no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith. (A. 151)

A petition for rehearing en banc or by the panel, adverting to a conflict between the decision of the panel and the decision in *Kelley* v. *Altheimer, supra,* with respect to

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[4] Plaintiffs filed notice of appeal and oral argument was originally scheduled at the same time as a case involving similar issues, *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir. 1967). However, the court reporter was ill for an extended period of time, and was unable to complete the transcript until April 1st, 1967 (A. 140, 152).

standards for approval of desegregation plans, was denied by the panel September 18, 1967.[5]

Summary of Argument

By dismissing the complaint, the courts below totally refused to supervise the desegregation process in this district and remitted Negro school children to an inadequate remedy under Title VI of the Civil Rights Act of 1964. Such a disposition is unprecedented. It is particularly difficult to comprehend here because the segregated system has not been disestablished and because, in formulating desegregation standards, the Department of Health, Education, and Welfare is guided by legal principles emanating from the courts.

There is a clear-cut choice in this district between a system composed of a reasonably-sized, integrated, elementary school and similar secondary school, or a system composed of two inefficiently-small, segregated, combination elementary and secondary schools. Under a "choice" plan the Negro school will continue to be all-Negro. On the other hand, a grade consolidation plan, utilizing one site as an elementary school and the other site as a secondary school, will immediately desegregate the system. The "choice" plan presently in operation is incapable of disestablishing segregation, but grade consolidation is sufficiently workable and attractive a method of administering the system for the lower courts to be required to consider it on the merits and order such relief, if not impractical.

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[5] The panel had attempted to distinguish *Kelley* stating that the "supporting facts in Altheimer are far stronger than those in our present case" (A. 145). The petition for rehearing *en banc* or by the panel, which strenuously objected to this characterization of the cases, is part of the record in this case but has not been printed. Petitioners have been informed by the office of the clerk of the court of appeals that this petition, pursuant to the Eighth Circuit practice, was denied by the panel which heard the *Gould* appeal and not by the court as a whole.

Brown v. *Board of Education* not only condemns compulsory racial assignments of public school children, but requires "a transition to racially non-discriminatory system." That goal is not achieved if schools are still maintained or identifiable as being for Negroes or for whites. It cannot be achieved until the racial identification of schools, consciously imposed by the state during the era of enforced segregation, has been erased. The specific direction in Brown II and general equitable principles require that school districts, formerly segregated by law, employ affirmative action to achieve this end. The courts below should fashion relief which, while consistent with educational and equitable principles, employs the speediest means available to disestablish the dual system and its vestiges, thereby achieving the unitary nonracial system mandated by the Constitution.

ARGUMENT

The Court Below Erred in Dismissing the Complaint Without Further Inquiry Into the Feasibility of Grade Consolidation or Other Relief Which Would Disestablish Segregation.

A. By Dismissing the Complaint, the Courts Below Abdicated Their Responsibility Under *Brown* v. *Board of Education* to Supervise Disestablishment of the Segregated System.

Petitioners made a timely challenge to construction of new secondary school classrooms at a Negro school site, inferior facilities offered Negro students, and continued operation of a segregated school system in Gould, Arkansas. They did not challenge the replacement of a dilapidated Negro school generally, but sought to require that the construction, not scheduled to begin for over a year, take place on the white school site. To do otherwise would result in

perpetuating an unmistakably identifiable Negro school in a system with only two school plants which had chosen to adopt a "choice" desegregation plan. The district court failed to enjoin construction at the Negro site, or to grant other relief, and dismissed the action. After a court reporter's illness delayed consideration of the appeal, the outer shell of the new classrooms was completed. In the court of appeals, petitioners sought utilization of the dual plants as constructed in a manner which would disestablish the segregated system or, alternatively, entry of a decree governing disestablishment of the dual system. The court ruled that it would not consider utilization of one plant for elementary students, and the other for secondary students, or entry of a decree governing the desegregation process because such relief was not sought in the trial court, and because there was "no substantial evidence to support a finding that the Board was not proceeding to carry out the [choice] plan in good faith" (A. 151). It affirmed dismissal of the complaint.

We submit this result demonstrates a misconception by the court of its equitable power and responsibility in a school desegregation case and an erroneous construction of what took place in the district court. Desegregation is by its nature a continuous process which requires continuing supervision by lower courts. Records on appeal are always somewhat out of date and relief to be effective must be fashioned with flexibility. In this case where completion of the construction merely altered the appropriate form of relief and where the desegregation of the district was at issue, dismissal of the complaint was improper abdication of any jurisdiction over the desegregation process. See *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955); *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Brooks* v. *School Board of Arlington County*, 324 F.2d 305 (4th Cir., 1963); *Smith* v.

Morrilton, 365 F.2d 770, 783 (8th Cir. 1966); *Yarbrough* v. *Hulbert-West Memphis*, 380 F.2d 962 (8th Cir. 1967); cf. *Smith* v. *Hampton Training School*, 360 F.2d 577, 581 (4th Cir. 1966); *Buckner* v. *Board of Education*, 332 F.2d 452 (4th Cir. 1964) and cases cited. "School desegregation cases involve more than a dispute between certain Negro children and certain schools. If Negroes are ever to enter the mainstream of American life as school children they must have equal educational opportunities with white children." [6]

The fact that petitioners' request for consideration of a grade consolidation plan had not been sought in the trial court does not justify dismissal of this case. The construction to which the consolidation related and the failure of the board to disestablish segregation, were the subject of timely attack in the district court. It was not feasible to raise the issue of consolidation because at the time the trial was held (November, 1965) the new construction was not scheduled to begin for over a year (January, 1967). At the very least, the court of appeals was obligated to remand to the district court to supervise disestablishment of segregation and for a hearing, with instructions to order grade consolidation if appropriate. It is submitted that by dismissal of the complaint, at a time when segregation is entrenched, the panel failed to adhere to the rule of *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955) and numerous decisions of lower courts which hold that district courts must retain jurisdiction until a racially nondiscriminatory school system is a reality. Secondly, by refusing to be influenced by developments subsequent to trial, even though their genesis, the construction program, was subject to timely attack, the court took a too narrow view of the power and duty of a

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[6] *United States* v. *Jefferson County Board of Education*, 372 F.2d 847, affirmed *en banc*, 380 F.2d 385, 389 (5th Cir. 1967) cert. denied *sub nom. Caddo Parish School Board* v. *United States*, —— U.S. ——, 19 L.ed 2d 103 (1967).

federal court of equity in supervising desegregation and granting relief required by the Constitution.[7]

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[7] In the second *Brown* decision this Court directed that "in fashioning and effectuating the decrees, the courts will be guided by equitable principles." (349 U.S. at 300). Equity courts have broad power to mold their remedies and adapt relief to the circumstances and needs of particular cases as graphically demonstrated by the construction given to 15 U.S.C. §4 in restraining violations of the Sherman Antitrust Act. The test of the propriety of such measures is whether remedial action reasonably tends to dissipate the effects of the condemned actions and to prevent their continuance, *United States* v. *National Lead Co.*, 332 U.S. 319 (1947). Where a corporation has acquired unlawful monopoly power which would continue to operate as long as the corporation retained its present form, effectuation of the Act has been held even to require the complete dissolution of the corporation. *United States* v. *Standard Oil Co.*, 221 U.S. 1 (1910); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948). Compare *N.L.R.B.* v. *Newport News Shipbuilding & Drydock Co.*, 308 U.S. 241, 250 (1939); *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

Numerous decisions establish that the federal courts construe their power and duties in the supervision of the disestablishment of state imposed segregation to require as effective relief as in the antitrust area. So in *Griffin* v. *School Board of Prince Edward County, Va.*, 377 U.S. 218 (1964) this Court ordered a public school system which had been closed to avoid desegregation to be reopened. *Carr* v. *Montgomery County (Ala.) Board of Education*, 253 F. Supp. 306 (M.D. Ala. 1966), ordered twenty-one (21) small inadequate segregated schools to be closed over a two year period and the students reassigned to larger integrated schools. *Dowell* v. *School Board of Oklahoma City*, 244 F. Supp. 971 (W.D. Okla., 1965), aff'd 375 F.2d 158 (10th Cir., 1967), cert. den. 387 U.S. 931 (1967), ordered the relief sought here—attendance areas of schools consolidated, with one school in each pair to become the junior high school and the other to become the senior high school for the whole consolidated area. The Fifth Circuit has held that a district court has power to enjoin "approving budgets, making funds available, approving employment contracts and construction programs . . . designed to perpetuate, maintain or support a school system operated on a racially segregated basis." *Board of Public Instruction of Duval Co., Fla.* v. *Braxton*, 326 F.2d 616, 620 (5th Cir., 1964). The Fourth Circuit and a panel of the Eighth Circuit have held that a school construction program is an appropriate matter for court consideration. *Wheeler* v. *Durham City Board of Education*, 346 F.2d 768 (4th Cir., 1965); *Kelley* v. *Altheimer*, 378 F.2d 483 (8th Cir., 1967).

The continuous nature of the desegregation process has consistently obligated appellate courts to fashion relief despite the occurrence of events subsequent to judgment in the district court. Such has been the

At one point in its opinion the court of appeals states that the parties had no opportunity to offer evidence on the feasibility of consolidation and the trial court had no opportunity to pass on the issue. If the defect was solely one of evidence, however, the proper remedy was remand for further proceedings, not dismissal. Other portions of the panel's opinion suggest, however, that it affirmed dismissal of the complaint for quite different, although also erroneous, reasons:

> Moreover, there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school when the appropriate time for such course arrives (A. 147).

Utilization of one school as elementary and one as secondary school is thus acceptable to the court of appeals but only "when the appropriate time for such course arrives." Such language and other portions of the opinions of the courts below strongly imply that a notion of deliberate speed—effectuated by a "choice" plan—led to rejection grade consolidation and not solely that petitioners did not seek in the trial court altered utilization of classrooms which were over a year away from construction at the time of trial. But the time for deliberate speed is over. Over two years ago this Court stated, "more than a decade has passed since we directed desegregation of public school facilities with all deliberate speed. . . . Delays in desegregating school systems are no longer tolerable." *Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103, 105 (1965). In 1964, the Court said: "There has been entirely

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common practice of the courts applying *Brown*, and indeed it had been the practice of the Eighth Circuit, until this case. *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Smith* v. *Morrilton*, 365 F.2d 770 (8th Cir., 1966).

too much deliberation and not enough speed. . . ." *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 229.

If the failure of the court of appeals to remand for consideration of grade consolidation, or to subject the board to a comprehensive judicial decree, rather than dismissing the complaint, rests on a finding by the court that no attack had been made on the desegregation plan in the trial court, it rests on a finding which is clearly erroneous. As the district court said: "One of plaintiff's contentions is that the Court should enjoin the defendant school board from maintaining a racially segregated system. But the testimony discloses that the school board is no longer maintaining such a system" (A. 14). The complaint sought to enjoin the board from compelling any Negroes to attend the all-Negro school (relief fundamentally inconsistent with a "choice" plan) and also sought to enjoin the "operating of a segregated school system" (A. 8). The trial is replete with testimony concerning the actual and expected operation of the plan (A. 53-63, 67-71, 75, 95, 96, 101, 102, 109, 117-18, 121-23). Indeed, the district court refused to enjoin the board from maintaining a segregated system and dismissed the complaint only because he found the H.E.W. plan sufficient compliance with the Constitution (A. 14, 24).

Another reason given by the court for dismissal—that the board was proceeding to carry out the plan in good faith—reflects a misconception of the role of lower courts in supervising the desegregation process, see *supra*, pp. 14-16. The record describes the administration of the Gould system in detail sufficient to show that whether the board is acting in good faith or not, its performance is not such as to permit the lower courts to avoid supervision of the desegregation process.

By their opinions and dispositions the courts below also indicated that dismissal was strongly influenced by the fact that the United States Department of Health, Education, and Welfare had, in their view, controlling responsibility for supervising school desegregation in Gould because the district had adopted a plan to conform with Title VI of the Civil Rights Act of 1964. To be sure, H.E.W. Guidelines deserve weight as general propositions of school desegregation law, and as minimum standards for court-ordered desegregation plans. The same cannot be said for H.E.W. administrative approval of a particular school district's actual compliance with constitutional standards. With its limited personnel and funds, the Department is simply unable to ascertain all of the relevant facts about the performance of an individual school district in the way that a court hearing can do (especially where H.E.W. Guidelines do not even purport to regulate an issue in the case—the effect of construction policy on desegregation). Because of a shortage of resources, H.E.W.'s "compliance reviews and enforcement proceedings" are "not planned in a rational and consistent manner"; the Department's appraisal of desegregation is often "faulty and inefficient." "Manpower limitations" force the Department to fail to proceed against many districts which are not in compliance. See *Southern School Desegregation*, 1966-67, A Report of the U. S. Civil Rights Commission, July, 1967, pp. 58, 59; Note, *The Courts, H.E.W. and Southern School Desegregation*, 77 Yale L.J. 329, 347 (1967). Compare *Cypress* v. *Non-sectarian Hospital Association*, 375 F.2d 648, 658 659 (4th Cir. 1967) where a hospital defended a desegregation suit on grounds of H.E.W. approval, but the court, sitting en banc, ruled that H.E.W.'s compliance mechanism was so inefficient that it was not an equitable defense to a suit based on deprivation of constitutional rights. H.E.W. "necessarily concerns itself with every school district in

the country" so that to hold that "H.E.W. has preempted jurisdiction would relegate the courts to the purely appellate role of reviewing the particular treatment afforded a school district by the government." Note, 77 Yale L. J. 321, 323 (1967). The practical effect of such rule would be to reduce the rate of desegregation for H.E.W.'s enforcement difficulties are enormous. Unfortunately, the sorry statistics of southern school desegregation, see *infra* p. 36, reflect the inability of the Department to police, effectively, compliance with the Guidelines.

Dismissal of school desegregation cases on the ground that school boards are subject to H.E.W. jurisdiction is a step which would thwart efforts to secure compliance with *Brown* v. *Board of Education* for still another reason. H.E.W. depends on the courts to enunciate the substantive standards on which its Guidelines, and their enforcement, are based, "to chart the outer limits of Title VI and to enforce nondiscrimination in those areas Title VI is not broad enough to cover." [8] A recent study of judicial and administrative efforts to achieve desegregation put the matter clearly:

> "At least under present HEW policy, the Office of Education's ability to attack discrimination will only grow and evolve as the constitutional requirements themselves do, for the government is only attempting to impose the same conditions required by the Fourteenth Amendment. The result, of course, is that future changes in HEW standards to permit attacks on the worst examples of racial imbalance or the elimination of freedom of choice as a legitimate desegregation plan will only occur if courts hold such phenomena and practices unconstitutional. Until the courts strike down

[8] Note, 77 Yale L.J. 321, 329 (1967).

> the free choice plan, the Office of Education will not move, and once the court so holds, the Office of Education has no choice but to act accordingly."[9]

The facts of this case are an excellent illustration of the Department's need to rely on judicially determined standards. While the Guidelines recognize that it is the responsibility of a school system to adopt and implement a desegregation plan which will eliminate the dual school system, and all other forms of discrimination, as expeditiously as possible, they nowhere direct themselves to the effect of school construction policies on the achievement of this goal and do not supply standards against which such policies may be measured. Thus, the dismissal of the complaint in this case remitted Negro children and their parents to regulations which do not contain standards directed to an injury they claim and are unlikely to do so until such standards are judicially recognized.

Additional factors make compelling the conclusion that a district court may not refuse to supervise the desegregation process for this reason. The regulations drafted by H.E.W. pursuant to Title VI make compliance satisfactory if a school system is subject to a final order of a court of the United States, 45 C.F.R. §80.4(c)(1)(1967). This is clear recognition that the Department will not insist on standards different from those adopted by the courts.[10]

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[9] *Ibid.*

[10] That H.E.W. accepts free choice plans as establishing the eligibility of a district for federal aid does not of course mean that such plans are constitutional. For the available evidence indicates that H.E.W. has approved such plans, despite the massive evidence of their inability to disestablish the dual system, only because they have received approval in the courts, and it is felt inappropriate to enforce requirements more stringent than those imposed by the Fourteenth Amendment. See the materials collected in Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 Va. L. Rev. 42 (1967); Note, 77 Yale L.J. 321 (1967).

Indeed it has been universally recognized that the Guidelines were drafted in light of prevailing judicial standards, e.g. *United States* v. *Jefferson County Board of Education, supra,* 372 F.2d 847, 851. In such circumstances, dismissal in deference to H.E.W. would be to inhibit the growth of departmental standards. The courts would defer to H.E.W. and H.E.W. would defer to the courts. A dangerous circular pattern of negative, rather than positive, enforcement would be created.

Petitioners complained, moreover, of a violation of their constitutional rights; not statutory rights which they may have under Title VI of the Civil Rights Act which regulates the relationship between the federal government and its grantees. The courts may not abdicate their responsibility to confront the performance of school boards in terms of the constitutional standards of the Fourteenth Amendment. Petitioners have been unable to locate any decision which holds to the contrary. In this regard, the courts below fundamentally misconstrued the rule of burden of proof in school desegregation cases. The burden of proof is not on Negro students to demonstrate that a school system which undisputedly has been segregated for generations (and which still maintains one of its two school plants as all-Negro) is still segregated, but on the school board to demonstrate that its desegregation plan desegregates the system, *Brown* v. *Board of Education, supra.* That burden is not carried solely by adoption of a "choice" plan when another plan which apparently is reasonable and practical will immediately desegregate the system.

B. Use of One School for Elementary Grades and the Other for Secondary Grades Is a Reasonable Alternative to a "Choice" Plan Which Will Disestablish the Dual System.

Petitioners do not ask this Court to order grade consolidation in this district but to consider the standard under which such an order by the district court would be appropriate. We believe that the proper course for this Court to follow is to vacate the judgment in order that the feasibility of consolidation may be determined in the courts below, with instructions to order such relief, if not impractical, because it will more speedily disestablish the dual system. We restrict ourselves, therefore, to a showing that (1) such utilization is shown by this record to be a sufficiently workable and attractive method of administering the system for the lower courts to be required to consider it on the merits, *infra* pp. 23-27, and (2) that the "freedom of choice" plan presently in operation is incapable of disestablishing segregation, *infra* pp. 27-38.

Because there are only two nearby schools in this small district, there is a clear choice between a system composed of reasonably-sized, integrated, elementary and secondary schools, or a system composed of two inefficiently-small, combination elementary and secondary schools. The superintendent's concession that under the "choice" plan the replaced Negro school would probably continue to be all-Negro, actual experience under the plan, as well as the obvious educational inefficiency and undesirability of the dual schools constitute a reasonable basis for providing that one site shall be used for an elementary school and the other site for a secondary school. (The dual school system might also be completely eliminated with a minimum of administrative difficulty in this district, where both races reside throughout, by a geographic assignment

plan, but such a plan would not end the manifest inefficiency of operating two small schools serving grades 1-12.) The system's school buildings as constructed are adaptable to changed usages and whatever additional cost might be involved in alteration, as the court of appeals recognized, is reasonably balanced against the continued extra operating cost of the inefficient dual system (A. 147).

The school facilities of the district ideally lend themselves to a plan of consolidation, which is, as recongized by the H.E.W. Guidelines and court decisions, an appropriate method of disestablishment:

> In some cases, the most expeditious means of desegregation is to close the schools originally established for students of one race, particularly where they are small and inadequate, and to assign all the students and teachers to desegregated schools. Another appropriate method is to reorganize the grade structure of schools originally established for students of different races so that these schools are fully utilized, on a desegregated basis, although each school contains fewer grades. (45 CFR §181.11)

See *Dowell* v. *School Board of Oklahoma City, supra.* Until 1967, the traditionally white Gould High School was the most modern facility in the district, having been completed in 1964 (A. 89). The immediately adjacent Gould Elementary School was originally constructed for use as a high school, and was subsequently converted to an elementary school (A. 81-82). If the Gould Elementary School were converted back to use as a secondary school, the Gould site would be clearly suitable for all the secondary students in the district (A. 145). The 1966-67 secondary enrollment

of the district was 360 for grades 8-12, while the total enrollment at the Gould School was 375 (grades 1-12).[11]

The all-Negro Field Elementary School is also a modern facility, constructed in 1954 with subsequent additions (A. 89-91). The gymnasium is adequate for both the present number of Negro elementary and Negro high school students, so that it would also be suitable for use by all of the elementary students in the system. The new building constructed by the system for use as the Negro high school is adjacent to the Field Elementary School, and can easily be furnished as an addition to the elementary school—which would make the combined Field School adequate for all of the elementary students in the district. The enrollment for the district in 1966-67 was 492 for grades 1-7, while the total enrollment at the Field School was 477 (grades 1-12).[12]

If there is some impediment to consolidation which the record does not reveal, the board should have the opportunity, on remand, to prove it, but absent some serious educational or practical deficiency in such a course, the board should not be permitted to reject it in favor of an assignment system which does not disestablish the dual system. For unless the board is required to cease maintaining dual facilities, a predominantly segregated school system will be fastened upon the community for at least another generation, and all students—Negro and white—will continue to pay the price of the inefficiency caused by operating a dual system in such a small district. This is graphically illustrated by the disparity in course offerings at the two high schools. If all students were attending the same high school, everyone would have the opportunity

[11] See footnote 1, *supra*.

[12] *Ibid.*

to take courses such as journalism or agriculture, as well as other courses which would be available because a higher total of students would elect them. Negroes who have no football or track programs would be able to participate in those sports. The basic sciences, chemistry and biology, are offered only in alternate years at Gould while they are offered every year at Field. There is no Future Farmers of America Program at Field only because no agriculture course is offered. In a consolidated system, all students would have the opportunity to take each of these courses every year.

The sad fact is that the board's failure to consolidate grades not only perpetuates segregation but deprives both Negroes and whites of significant educational opportunities. To be sure, the Fourteenth Amendment may not require that school administrators operate their system in the most efficient manner, but their failure to do so, without explanation, demonstrates the racial purpose of the "choice" assignment plan, *infra*, pp. 27-38.[13] It is no accident that the board ignores the recommendations of the most important study of secondary education that has been made in this country, James Bryant Conant's, *The American High School Today* (1959) which gives highest priority in educational planning to the elimination of small high schools with graduating classes of less than one hundred.[14]

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[13] A similar inference was made in *Kelley* v. *Altheimer*, 378 F.2d 468 (8th Cir. 1967). There the school board added additional classrooms at each of two complexes, one traditionally maintained for Negroes the other for whites:

> We conclude that the construction of the new classroom buildings had the effect of helping to perpetuate a segregated school system and should not have been permitted by the lower court.

[14] "The enrollment of many American public high schools is too small to allow a diversified curriculum except at exorbitant expense . . . The prevalence of such high schools—those with graduating classes of less than one hundred students—constitutes one of the serious obstacles to

See *Moses* v. *Washington Parish School Board*, — F. Supp. — (E.D. La., Oct. 19, 1967) ("Free choice" plan "wasteful in every respect"; geographic zones ordered).

The court of appeals recognized that there is substantial evidence that consolidation is a feasible alternative to "freedom of choice" when it found that "there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school *when the appropriate time for such a course arrives.* We note that the building now occupied by the predominantly white grade school had originally been built to house the Gould High School" (emphasis supplied) (A. 145). Given the apparent feasibility of grade consolidation and the deficiencies of a "choice" plan in this district, see *infra* pp. 33-35, the court of appeals had an obligation to fashion a remedy equal to the task of disestablishing the dual structure. Instead, it erroneously affirmed dismissal of the complaint.

C. Freedom of Choice Is Incapable of Disestablishing Segregation in the Gould School District.

The duty of the school board was to convert the dual school system it had created into a unitary non-racial system. Although it had an alternative which would have disestablished the dual system immediately, and with less educational inefficiency, the board adopted a method whose

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good secondary education throughout most of the United States. I believe such schools are not in a position to provide a satisfactory education for any group of their students—the academically talented, the vocationally oriented, or the slow reader. The instructional program is neither sufficiently broad nor sufficiently challenging. A small high school cannot by its very nature offer a comprehensive curriculum. Furthermore, such a school uses uneconomically the time and efforts of administrators, teachers, and specialists, the shortage of whom is a serious national problem" (p. 76).

success depended on the ability of Negroes to unshackle themselves from the psychological effects of the dual system of the past, and to withstand the fear and intimidation of the present and future. Only the "choice" plan selected by the board subjects Negroes to the possibility of intimidation or gives undue weight to the very psychological effects of the dual system that this Court found unconstitutional in *Brown* v. *Board of Education*. Nor did the board introduce evidence to justify adoption of a method, 11 years after *Brown*, which if it could disestablish the dual system at all, would require a much longer period of time than available alternatives. The failure of the board to show the existence of any administrative reasons, such as this Court contemplated in *Brown II* might justify delay, made it error for the courts below to abdicate to an administratively supervised "choice" plan.

After *Brown*, southern school boards were faced with the problem of "effectuating a transition to a racially nondiscriminatory system" (*Brown II* at 301). The easiest method, administratively, was to convert the dual attendance zones into single attendance zones, without regard to race, so that assignment of all students would depend only on proximity and convenience.[15] With rare exception, however, southern school boards, when finally forced to begin desegregation, rejected this relatively simple method in favor of the complex and discriminatory procedures of pupil placement laws and, when those were invalidated, switched to what has in practice worked the same way—the so-called free choice.[16]

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[15] Indeed, it was to this method that this Court alluded in Brown II when it stated "[t]o that end, the courts may consider problems related to administration arising from revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis" (349 U.S. at 300-301).

[16] According to the Civil Rights Commission, the vast majority of school districts in the south use freedom of choice plans. See *Southern School*

Under so-called free choice students are allowed to attend the school of their choice. Most often they are permitted to choose any school in the system. In some areas, they are permitted to choose only either the previously all-Negro or previously all-white school in a limited geographic area. Not only are such plans more difficult to administer (choice forms have to be processed and standards developed for passing on them, with provision for notice of the right to choose and for dealing with students who fail to exercise a choice),[17] they are, in addition,—as experience dem-

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Desegregation, 1966-67, A Report of the U. S. Commission on Civil Rights, July, 1967. The report states, at pp. 45-46:

> Free choice plans are favored overwhelmingly by the 1787 school districts desegregating under voluntary plans. All such districts . . . in Alabama, Mississippi, and South Carolina, without exception, and 83% of such districts in Georgia have adopted free choice plans. . . .

[17] Section II of the decree appended by the United States Court of Appeals for the Fifth Circuit, to its recent decision in *United States* v. *Jefferson County Board of Education, supra*, shows the complexity of such plans. That court had previously described such plans as a "haphazard basis" for the administration of schools. *Singleton* v. *Jackson Municipal Separate School District*, 355 F.2d 865, 871 (5th Cir. 1966).

Under such plans school officials are required to mail (or deliver by way of the students) letters to the parents informing them of their rights to choose within a designated period, compile and analyze the forms returned, grant and deny choices, notify students of the action taken and assign students failing to choose to the schools nearest their homes. Virtually each step of the procedure, from the initial letter to the assignment of students failing to choose, provides an opportunity for individuals hostile to desegregation to forestall its progress, either by deliberate misperformance or non-performance. The Civil Rights Commission has reported on non-complaince by school authorities with their desegregation plans:

> In Webster County, Mississippi, school officials assigned on a racial basis about 200 white and Negro students whose freedom of choice forms had not been returned to the school office, even though the desegregation plan stated that it was mandatory for parents to exercise a choice and that assignments would be based on that choice [footnote omitted]. In McCarty, Missouri after the school board had

onstrates (*infra* pp. 33, 36)—far less likely to disestablish the dual system.

Under "choice" plans, the extent of actual desegregation varies directly with the number of students seeking, and actually being permitted, to transfer to schools previously maintained for the other race. It should have been obvious, however, that white students—in view of general notions of Negro inferiority and the hard fact that far too often Negro schools are vastly inferior to those furnished whites see *supra* pp. 6-8—would not transfer to formerly Negro schools; and, indeed, very few have.[18] From the beginning the burden of disestablishing the dual system under free choice was thrust upon Negro children and their parents, despite this Court's admonition in *Brown II* (349 U.S. 294, 299) that "school authorities had the primary responsibility."

The notion that the making available of an unrestricted choice satisfies the Constitution, quite apart from whether significant numbers of white students choose Negro schools or Negro students white schools, is, we submit, funda-

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distributed freedom of choice forms and students had filled out and returned the forms, the board ignored them.

Survey of School Desegregation in the Southern and Border States, 1965-1966, at p. 47. Given the other shortcomings of free choice plans, there is serious doubt whether the constitutional duty to effect a nonracial system is satisfied by the promulgation of rules so susceptible of manipulation by hostile school officials. As Judge Sobeloff has observed:

> A procedure which might well succeed under sympathetic administration could prove woefully inadequate in an antagonistic environment.

Bradley v. *School Board of the City of Richmond*, 345 F.2d 310 (4th Cir. 1965) (concurring in part and dissenting in part).

[18] "During the past school year, as in previous years, white students rarely chose to attend Negro schools." *Southern School Desegregation*, 1966-67 at p. 142; *United States* v. *Jefferson County Board of Education*, *supra*, 372 F.2d at 889.

mentally inconsistent with the decisions of this Court in *Brown I* and *II*; *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Bradley* v. *School Board of the City of Richmond*, *supra*, and the entire series of cases it has decided.[19] *Brown* contemplates complete reorganization. It condemns not only compulsory racial assignments of public school students, but also the maintenance of a dual public school system based on race—where some schools are maintained or identifiable as being for Negroes or others for whites. It presupposed a major reorganization of the educational systems of the affected states, the extent of which is suggested by the fact that the court took an additional year to consider the problem of relief. The direction in *Brown II*, to the district courts that they might consider

> problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems (349 U.S. at 300-301)

amply demonstrates the magnitude and thoroughness of the reorganization envisaged.

If this Court in *Brown I* and *II* had thought that a "racially non-discriminatory system" would be achieved although Negro and white students would continue as before to attend schools designated for their race, none of the quoted language was necessary. It would have been suffi-

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[19] See *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Calhoun* v. *Latimer*, 377 U.S. 263 (1964); *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Goss* v. *Board of Education*, 373 U.S. 683 (1963).

cient merely to say "compulsory racial assignment shall cease." But the Court did not stop there. Rather it ordered a pervasive reorganization so that the system would be transformed into one that was "unitary and nonracial," one in which schools would no longer be identifiable as being for Negroes or whites. That students have been permitted to choose a school does not destroy the racial identification of that school if it continues to serve students of one race, is staffed solely by teachers of that race, or is treated as a Negro or white school by school officials. The only way racial identifications—consciously imposed by the state during the era of enforced segregation—can be erased is by having schools serve students of both races, through teachers of both races. This is what we think disestablishment of the dual system means and this is what we submit the *Brown* decisions require.

Given the premise of *Brown* v. *Board of Education*—that segregation in public education had very deep and long term effects upon Negroes—it is not surprising that individuals, reared in that system and schooled in the ways of subservience (by segregation in schools and every other conceivable aspect of existence) who are given the opportunity to "make a choice," chose, by inaction, that their children remain in Negro schools.[20] By making the Negro's exercise of choice the critical factor, school authorities have

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[20] In its *Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964* (referred to as the Guidelines), the Department of Health, Education, and Welfare states (45 CFR §181.54):

> A free choice plan tends to place the burden of desegregation on Negro or other minority group students and their parents. Even when school authorities undertake good faith efforts to assure its fair operation, *the very nature of a free choice plan and the effect of longstanding community attitudes often tend to preclude or inhibit the exercise of a truly free choice by or for minority group students.* (Emphasis added.)

insured desegregation's failure. Moreover, intimidation, a weapon well-known throughout the south, has been employed to deter transfers. Every community pressure militates against the affirmative choice of white schools by Negro parents. Here the heavy hand of segregation did its work in overt fashion.

First, *"the only school desegregation plan that meets constitutional standards is one that works"* (*United States* v. *Jefferson County Board of Education, supra,* 372 F.2d at p. 847 (emphasis in original)) and the Gould plan has not worked. In both first and second year of its operation only about 70 Negro pupils attended the white school and no whites "chose" to attend the Negro school. The number seems to have climbed only slightly in the 1967-68 school year.[21] In the first year of the plan several Negroes "chose" the white school but were refused admission due to overcrowding, an overcrowding caused in part by the fact that no whites "chose" to attend the Negro school. Only one teacher has been assigned to a desegregated faculty, and that teacher on a part time basis. No Negro teacher has been assigned to teach at the white school. In short, fourteen years after *Brown*, "freedom of choice" has not and does not appear capable of disestablishing segregation.

Second, the record shows active intimidation of the Negro community. The PTA of the Negro school was prohibited by the superintendent from meeting at the school once it began to protest conditions there, and an injunction was obtained by the board of education against public protests concerning school conditions (A. 63-64).

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[21] In June, 1967, the superintendent informed the Department of Health, Education and Welfare that he anticipated an increase of only 14 Negro students in the white school for the 1967-68 school year, the third year of desegregation and that again no whites would attend the Negro school, see note 1, *supra.*

Third, the degree of inequality between the Negro and white high schools which has been maintained for so long has inevitably communicated to the Negro community that the board could not be trusted to administer a "freedom of choice" plan fairly, and that the choice offered was not really free. Until 1965, the Negro high school had such a poor physical plant and program that it was completely unaccredited by the State of Arkansas, while the white high school had an "A" rating (A. 10, 16, 31, 83, 130). Long promised reconstruction took place only after adoption of a desegregation plan (itself required to obtain federal funds) when a new school would have the possible effect of limiting the number of Negro transferees under the choice plan. Not only has the practice of segregation followed by this district been unconstitutional since 1954, but the "gross inferiority" of the separate public school facilities provided for Negro students has been unconstitutional at least since 1938, *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337; *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950). The court of appeals erred, fundamentally, in ignoring the relevance of these historic inequalities to the validity of the choice plan and the need to explore alternate methods of disestablishment.

Fourth, the character of the new replacement construction on the traditional segregated site (and that no rational educational purpose is apparent behind such dual construction) is not susceptible to any other interpretation by the community, Negro *and* white, than that the board wishes to maintain a segregated system, with one school intended for whites and the other intended for Negroes, cf. *Kelley* v. *Altheimer,* 378 F.2d 483, 490, 496 (8th Cir. 1967). This was just as unambiguous an act as re-writing the word "white" over the door of the Gould School and the word "Negro" over the door of the Field School—and

is just as coercive to Negroes who have traditionally been informed by the segregated system that they were not wanted in "white" institutions, and to whites who have been informed that it was not proper for them to be in "Negro" institutions. The replacement construction here has precisely the same effect on the "freedom" in a "freedom of choice" plan as does the maintenance of all-white and all-Negro faculties at various schools in a system. *Cf. Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103 (1965); *Kier* v. *County School Board of Augusta Co., Va.*, 249 F. Supp. 239, 246 (W. D. Va., 1966).

Fifth, the integration of faculty is a factor absolutely fundamental to the success of a desegregation plan, for a school with a Negro or white faculty will always be a Negro or white school. Nevertheless, the Board has not assigned Negro teachers to regular teaching at the traditionally white school, and only one white to part time duties at the traditionally, and still, all-Negro school (A. 67-70; see note 1, *supra*). There are no plans for substantial desegregation in the future (A. 68-69).[22] Compare the panel's indifference to the faculty issue with the treatment accorded the issue in the decision of another Eighth Circuit panel in *Kelley* v. *Altheimer*, 378 F.2d 483, 491 (1967).

With rare exception school officials adopt, and the lower courts condone, free choice knowing full well that it will produce less Negro students in white schools, and less injury to white sensibilities than under consolidation, geographic attendance zone, or other available methods. These expectations are justified. Meaningful desegregation has

[22] The failure of the board to take meaningful steps to integrate its faculty is consistent with what the record shows: that the board, by adopting freedom of choice, could not in good faith have believed or intended that the dual system would thereby be converted into the nonracial system required by the Constitution.

not resulted from the use of free choice. Even when Negroes have transferred, however, desegregation has been a one-way street—a few Negroes moving into the white schools, but no whites transferring to the Negro schools. In most districts, therefore, as in the case before the Court, the vast majority of Negro pupils continue to attend school only with Negroes. Although the proportion of Negroes in all-Negroes schools has declined since *Brown*, more Negro children are now attending such schools than in 1954.[23] Indeed, during the 1966-67 school year, a full 12 years after Brown, more than 90% of the almost 3 million Negro pupils in the 11 Southern states still attended schools which were over 95% Negro and 83.1% were in school which were 100% Negro.[24] "This June, the vast majority of Negro children in the South who entered the first grade in 1955, the year after the Brown decision, were graduated from high school without ever attending a single class with a single white student."[25] As the Fifth Circuit has said, "[f]or all but a handful of Negro members of the High School Class of 1966, this right [to equal educational opportunities with white children in a racially non-discriminatory public school system] has been of such stuff as dreams are made on."[26] And in its most recent report, the Civil Rights Commission states:

> The review of desegregation under freedom of choice plans contained in this report, and that presented in last years commission's survey of southern school desegregation, show that *the freedom of choice plan*

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[23] *Southern School Desegregation*, 1966-67, at p. 11.

[24] *Id.* at 165.

[25] *Id.* at 147.

[26] *United States* v. *Jefferson County Board of Education*, *supra*, 372 F.2d at 845.

> *is inadequate in the great majority of cases as an instrument for disestablishing a dual school system.* Such plans have not resulted in desegregation of Negro schools and therefore perpetuate one-half of the dual school system virtually intact. (Emphasis added.)[27]

Petitioners submit that a freedom of choice plan is constitutionally unacceptable where as in this case, there are other methods, educationally feasible and no more difficult to administer, which would more speedily disestablish the dual system.

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[27] *Southern School Desegregation*, 1966-1967, pp. 152-153. In an earlier report, *Racial Isolation in the Public Schools*, 1967, the Civil Rights Commission observed (at p. 69) that, ". . . the degree of school segregation in these free-choice systems remain high," and concluded that (*ibid*): "only limited school desegregation has been achieved under free choice plans in Southern and Border city school systems."

CONCLUSION

WHEREFORE, petitioners pray that the judgment below be vacated and the cause remanded for appropriate proceedings.

Respectfully submitted,

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